

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

|  |   |                      |
|--|---|----------------------|
| <b>MODESTA AGUILAR</b>                     | ) |                      |
| Claimant                                   | ) |                      |
| VS.  | ) |                      |
|  | ) | Docket No. 1,017,697 |
| <b>SCHWAN'S FOOD MANUFACTURING INC.</b>    | ) |                      |
| d/b/a <b>TONY'S PIZZA</b>                  | ) |                      |
| Respondent                                 | ) |                      |
| AND  | ) |                      |
|  | ) |                      |
| <b>HARTFORD CASUALTY INSURANCE COMPANY</b> | ) |                      |
| Insurance Carrier                          | ) |                      |

**ORDER**

Claimant appeals the March 29, 2006 Award of Administrative Law Judge Bruce E. Moore. Claimant was awarded benefits for injuries suffered to her upper extremities for a 7.65 percent impairment of function to each upper extremity. The Appeals Board (Board) heard oral argument on July 18, 2006.

**APPEARANCES**

Claimant appeared by her attorney, D. Shane Bangerter of Dodge City, Kansas. Respondent and its insurance carrier appeared by their attorney, Dustin J. Denning of Salina, Kansas.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopts the stipulations contained in the Award of the Administrative Law Judge (ALJ).

**ISSUES**

What is the nature and extent of claimant's injuries and disability?

**FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant a 9.2 percent permanent partial disability to the whole body.

Claimant began working for respondent in August 2002 in respondent's packaging department. This job required claimant to put frozen pizzas into a machine that would box the pizzas in cartons, and claimant would then lift the cartons. Claimant estimated that she packaged approximately 100 pizzas every 15 minutes. On April 20, 2004, claimant began experiencing right wrist and hand problems. These problems were reported to respondent's plant nurse, and treatment was provided.

Claimant came under the care of James J. Shafer, M.D., respondent's plant doctor. Claimant saw Dr. Shafer on several occasions. She was referred to William D. Kossow, M.D., for nerve conduction tests on June 8, 2004. These tests were reported as normal. Claimant was referred to Gary L. Harbin, M.D., on July 28, 2004. Dr. Harbin ordered a bone scan of the wrist which was performed on July 29, 2004, which also proved normal. Claimant was returned to her regular duties on June 17, 2004.

On June 23, 2004, claimant began experiencing pain in her left hand and wrist. These problems began when claimant was moving bins full of pizzas.

After claimant was released by Dr. Shafer, she sought treatment from her own doctor, Dr. Hanson, who imposed work restrictions on claimant and referred her to Michael J. Johnson, M.D., a hand specialist. Claimant saw Dr. Johnson on June 29, 2004. When claimant presented Dr. Hanson's restrictions to respondent, the nurse advised claimant that Dr. Shafer had released her and Dr. Hanson's restrictions were not to be considered. On June 28, 2004, claimant was then placed on "leave of absence" status pending a review. Claimant was returned from the leave of absence on July 1, 2004. She then went on "leave of absence" again on July 9 and remained there until returning to work on September 21, 2004.

Claimant was referred by respondent to board certified orthopedic surgeon J. Mark Melhorn, M.D., for an examination on September 17, 2004. A second NCT done in Dr. Melhorn's office on September 21, 2004, was negative for carpal tunnel syndrome. It was also negative for ulnar cubital syndrome. Dr. Melhorn diagnosed two separate events representing an aggravation of her condition, which led to treatment for carpal tunnel-like syndrome. He testified that some of the testing demonstrated symptoms consistent with atypical carpal tunnel syndrome. However, the elbows, shoulder and cervical patterns all seemed normal. Claimant elected to proceed with surgery, which Dr. Melhorn performed on claimant's right wrist on November 9, 2004, and on her left wrist on December 14, 2004.

Dr. Melhorn diagnosed claimant with atypical carpal tunnel syndrome, bilaterally, which he testified was aggravated by her work. He assessed claimant with a 5.3 percent impairment of function to claimant's right and left forearms, which rounded up to a 6.36 percent whole body impairment. This rating was pursuant to the fourth edition of the *AMA Guides*.<sup>1</sup> Dr. Melhorn said claimant did not have ulnar cubital syndrome during the time he treated her.

Claimant was referred by her attorney to Pedro A. Murati, M.D., board certified in physical medicine and rehabilitation, for an examination on April 4, 2005. Dr. Murati performed an examination on claimant, but did no diagnostic testing. He diagnosed claimant with bilateral carpal tunnel syndrome, post surgery; bilateral ulnar cubital syndrome; and a left thumb sprain which was not related to her employment. He found claimant's conditions (excluding the left thumb sprain) to directly result from her work-related accidents with respondent on April 20, 2004, and continuing each and every day thereafter. Dr. Murati assessed claimant a 10 percent impairment to each upper extremity for the carpal tunnel syndrome and a 10 percent impairment to each upper extremity for the ulnar cubital syndrome, pursuant to the fourth edition of the *AMA Guides*,<sup>2</sup> which, when combined pursuant to the *AMA Guides* conversion chart, results in a 21 percent whole person impairment.

In workers compensation litigation, it is the claimant's burden to prove her entitlement to benefits by a preponderance of the credible evidence.<sup>3</sup>

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.<sup>4</sup>

In the Award, the ALJ found claimant entitled to two scheduled injuries, citing *Pruter*.<sup>5</sup> However, in *Pruter*, the Kansas Supreme Court was asked to consider whether an injured worker who injured her right wrist and right ankle in a single fall was entitled to compensation under K.S.A. 44-510d (the scheduled injury statute) or a non-scheduled

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<sup>1</sup> American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

<sup>2</sup> *AMA Guides* (4th ed.).

<sup>3</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

<sup>4</sup> *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

<sup>5</sup> *Pruter v. Larned State Hospital*, 271 Kan. 865, 26 P.3d 666 (2001).

injury under K.S.A. 44-510e. In a detailed decision, the court found Pruter to be limited to two scheduled injuries.

The *Pruter* court, in its analysis, discussed both *Downes*<sup>6</sup> and *Murphy*.<sup>7</sup> In both *Downes* and *Murphy*, the employee suffered simultaneous injuries to parallel members. The *Pruter* court, in citing *Murphy*, which cited *Honn*,<sup>8</sup> stated “[u]nder *Honn*, when both hands, arms, feet, or legs are partially disabled, the disability is no longer a scheduled injury under K.S.A. 44-510d, but instead is classified as a permanent partial general disability to the body as a whole under K.S.A. 44-510e.”<sup>9</sup>

The Board finds this situation to be more similar to that in *Downes* and *Murphy* rather than *Pruter*. Here, claimant suffered separate injuries to both her upper extremities, but continued working, suffering additional simultaneous injuries during her work for respondent. Claimant testified that the longer she worked, the worse the condition in her hands and wrists became.<sup>10</sup>

The Board, therefore, modifies the Award of the ALJ to grant claimant an award for a permanent partial disability under K.S.A. 44-510e. Dr. Melhorn found claimant to have a 6.36 percent impairment to the whole body. Dr. Murati found claimant to have suffered a 21 percent impairment to the body. However, the Board agrees with the ALJ that Dr. Murati’s impairment includes findings not supported by this record. Dr. Murati found claimant to have suffered from bilateral ulnar cubital syndrome. This diagnosis was reached without the availability of any testing to confirm the diagnosis. Dr. Melhorn, on the other hand, performed NCT tests to claimant’s upper extremities and testified claimant did not have ulnar cubital syndrome. The Board finds Dr. Melhorn’s opinion to be the most persuasive in this instance.

Claimant is, therefore, awarded a disability for the bilateral carpal tunnel syndrome. Dr. Murati rated claimant at 10 percent to each extremity for the carpal tunnel syndrome. This converts to a 6 percent whole body impairment to the body for each upper extremity, which then combines to a 12 percent whole person permanent partial disability under the *AMA Guides*. When comparing Dr. Melhorn’s 6.36 percent impairment with Dr. Murati’s 12 percent impairment, the Board finds no persuasive reason to give one greater weight

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<sup>6</sup> *Downes v. IBP, Inc.*, 10 Kan. App. 2d 39, 691 P.2d 42 (1984), *rev. denied* 236 Kan. 875 (1985).

<sup>7</sup> *Murphy v. IBP, Inc.*, 240 Kan. 141, 727 P.2d 468 (1986).

<sup>8</sup> *Honn v. Elliott*, 132 Kan. 454, 295 Pac. 719 (1931).

<sup>9</sup> *Pruter* at 871-872.

<sup>10</sup> P.H. Trans. at 23; R.H. Trans. at 14.

over the other. In averaging both, the Board finds claimant to be entitled to a 9.2 percent permanent partial disability to the body for the injuries suffered while working for respondent. The Award of the ALJ is modified accordingly.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Bruce E. Moore dated March 29, 2006, should be, and is hereby, modified to award claimant a 9.2 percent permanent partial disability to the whole body for the injuries suffered while working for respondent.

**WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR** of the claimant, and against the respondent, Schwan’s Food Manufacturing Inc., and its insurance carrier, Hartford Casualty Insurance Company, for an accidental injury which occurred through a series of accidents through June 28, 2004, and based upon an average weekly wage of \$402.58, for 10 weeks of temporary total disability compensation at the rate of \$268.40 per week or \$2,684.00, followed by 38.18 weeks at the rate of \$268.40 per week or \$10,247.51 for a 9.2 percent permanent partial general disability, making a total award of \$12,931.51.

As of the date of this award, the entire amount is due and owing and ordered paid in one lump sum less any amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of August, 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

- c: D. Shane Bangerter, Attorney for Claimant
- Dustin J. Denning, Attorney for Respondent and its Insurance Carrier